

been no offence. That was not done, and the offence was committed. It is always a grave offence, and a public danger, to have communication with an enemy country except with the consent of the Crown. The distinct warning by the Proclamation disregarded precludes any suggestion of ignorance of law.

I agree that the appeal should be dismissed.

GAVAN DUFFY J. I agree that both defendants were rightly convicted on the evidence before the Magistrate. In saying this I do not suggest that Mr. Siwertz necessarily knew that he was doing anything which was either *malum prohibitum* or *malum in se*.

*Both appeals dismissed with costs.*

Solicitor for the appellants, *W. E. Hawkins*.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

IN RE HYNDS.

*Mortgage—Foreclosure—Leave to take proceedings—Onus of proof—Discretion—War Precautions (Moratorium) Regulations (Statutory Rules 1916, No. 284—Statutory Rules 1916, No. 324—Statutory Rules 1917, No. 13), regs. 4 (5), 7.*

On an application under the *War Precautions (Moratorium) Regulations* by a mortgagee for leave to take proceedings against the mortgagor for redemption or repayment, if the case falls within the terms of reg. 4 (5) the onus is upon the mortgagee to satisfy the Court either that by reason of the wasting nature of the security the continuance of the mortgage would seriously affect the security or that the conduct of the mortgagor has in the respects mentioned in the regulation been such as to render him undeserving of the benefit or protection of the Regulations, and unless the Court is so satisfied it has no discretion to grant the relief asked.

H. C. OF A.  
1917.

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BALTIC  
SEPARATOR  
CO. LTD. AND  
SIWERTZ  
v.  
DONOHOE.

—  
Gavan Duffy J.

H. C. OF A.  
1917.

~  
HOBART,  
Feb. 23, 28.

—  
Barton J.  
—  
IN CHAMBERS.



## H. C. OF A. SUMMONSES.

1917.

IN RE  
HYNDS.

Robert Hynds, who was the owner of certain lands, hereditaments and premises, including a hotel, at Woodbridge in Tasmania, had mortgaged them by first mortgages to Robert Hardy Topham, by second and third mortgages to the Cascade Brewery Co. Ltd. and by fourth mortgages to William Henry Burgess, the younger, and Walter Herbert Cummins. He had also given to the Cascade Brewery Co. Ltd. a bill of sale over certain chattels upon the premises.

An application was made to the High Court by summons by Topham for leave to call up the principal sum secured by his mortgages, to exercise the power of sale contained or implied in the mortgages, and to take steps to obtain an order for foreclosure and for possession of the mortgaged premises.

A similar application was also made by the Cascade Brewery Co. Ltd. in respect of their mortgages and bill of sale.

The applications now came on for hearing and were heard together.

Other material facts are stated in the judgment hereunder.

*L. L. Dobson*, for the applicants, in support.

*W. H. Hudspeth*, for Burgess and Cummins, to oppose.

There was no appearance for Hynds.

*Cur. adv. vult.*

Feb. 28.

BARTON J. read the following judgment:—In this case no evidence has been given or argument adduced on the part of the first applicant which satisfies me regarding either of the requirements of pars. (a) and (b) of sub-reg. 5 of reg. 4 of *Statutory Rules* 1916, No. 284, as amended by *Statutory Rules* 1917, No. 13. The date fixed by the mortgage to Topham for repayment of the principal sum has long since passed, and the date up to which Topham verbally agreed to defer the calling in of the principal money was 16th December 1916; and the principal remains wholly unpaid. I am of opinion that the mortgagor, Hynds, is unable to redeem the property or to pay even a portion of the principal sum



out of his own moneys (see *Statutory Rules* 1917, No. 13, reg. 2, par. (e)). He cannot pay even the interest. In any such case, unless I am satisfied as to either of the requirements above mentioned—as to both of which the onus lies on the applicant—reg. 4 (5) deprives me of discretion to grant the leave asked for. I am of opinion that the sub-regulation applies, as its words indicate, to any case in which the principal is overdue and the mortgagor is unable to redeem, or even to repay in part, and the Court is not satisfied under either par. (a) or par. (b). I am not so satisfied, and I must therefore dismiss Topham's application.

The application of the Cascade Brewery Co. has been heard together with Topham's; so I deal with it also now. The advance by the Cascade Brewery Co. under mortgage was repayable on demand, and although there has been fruitless demand of interest there is no evidence that the principal itself has been demanded. But reg. 7 of *Statutory Rules* 1916, No. 284, as amended (*Statutory Rules* 1916, No. 324, reg. 2), provides that where a mortgage for a specific amount provides for the payment of the principal sum on demand, and a demand has not at the commencement of the Regulations been made, the principal sum shall, for the purpose only of the Regulations, be deemed to be payable immediately after the commencement of the Regulations. The commencement of the Regulations—now some time past—must, therefore, in such a case be held to be the date fixed by the mortgage for repayment; and this result brings the Company's case into line with Topham's even if repayment has been demanded, of which there is no evidence, as I have pointed out. So that I cannot grant their application.

I may add as to both these cases that, even apart from the grounds I have stated, I do not think that either application ought to be granted. It is true that the mortgagor has not been able to pay his interest; his income has evidently so largely dwindled that he is deprived of the power to do so. For the same reason, and *à fortiori*, he could not at present pay any part of the principal moneys. A bad fruit season has been added to the difficulties, already heavy enough, caused by the War—for instance, a falling off in the traffic of an hotel in a locality normally much frequented by

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tourists. There have been other hardships, however necessary, of which all struggling business men, including orchardists and publicans, are conscious, and it is easy to see that the mortgagor's prospects of speedily redeeming his properties are very slight if much pressure is exercised. But if he is not pressed I think that as times improve he may reasonably be expected to come gradually into a position to pay his way. I cannot say that it is improbable that under such circumstances he will become able to discharge the mortgages and free his property. I think, therefore, that this is such a case as the moratorium was intended to relieve and protect.

Further, I am far from satisfied that it would be "unjust and inequitable" not to grant the applications or either of them (see *Statutory Rules* 1917, No. 13, reg. 2 (d) ).

As Hynds has not appeared, he will, of course, not have any costs. The costs of the fourth mortgagees of opposing these applications are to be paid by the applicants in equal moieties.

*Applications dismissed.*

Solicitors for the applicant, *Dobson, Mitchell & Allport.*

Solicitors for Burgess and Cummins, *Page, Hodgman & Seager.*

B. L.